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No. 03-932

IN THE

Supreme Court of the United States

DURA PHARMACEUTICALS, INC.; CAM L. GARNER; JAMES W. NEWMAN; CHARLES W. PRETTYMAN; WALTER F. SPATH; JAMES C. BLAIR; JULIA R. BROWN; JOSEPH C. COOK, JR.; and MITCHELL R. WOODBURY,

Petitioners,

v.

MICHAEL BROUDO; BALDEV S. GILL; LARRY MORGAN IRA; LEONID SHVARTSMAN (for G&S partnership); NEIL SISKIND; ROBERTA SPECK; and BRENT VOGT, On Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to decide a question on which there is little, if any, real disagreement among the circuits, and the resolution of which makes no difference on the facts of this case.

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INTRODUCTION

This is a case in which investors allege that they paid too much for common stock of Dura Pharmaceuticals because Dura and its top officers—the defendants below and petitioners before this Court—had deliberately deceived the market in two respects. First, the plaintiff investors contend that Dura led the market to believe that its existing products—including one called Ceclor—were selling better than they really were. Second, the investors contend that

Dura misled the market about the prospects of a new drug-delivery product called Albuterol Spiros, for which it was seeking approval from the Food and Drug Administration ("FDA").

As to the first set of misrepresentations, about demand for and sales of existing products, Dura's stock price collapsed by around 47% in a single day following the company's February 24, 1998, admissions regarding slow sales and a resulting revenue shortfall for the upcoming year. Petition at 2. As to the second set of misrepresentations, about Albuterol Spiros, petitioners acknowledge in a footnote that Dura's stock price similarly declined by more than 21% "from $12.375 to $9.75" following a November 3, 1998, announcement that the FDA had refused approval, citing serious problems with the product. Petition at 3 n.4.

Not surprisingly, the Ninth Circuit held that in light of the materiality of the misrepresentations alleged, and the resulting inflation in the price of Dura stock, plaintiffs who purchased the stock at inflated prices only to see it decline on disclosure of the truth had adequately alleged loss causation to proceed with a claim under § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). It rejected defendants' contention that a portion of plaintiffs' case should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

Petitioners do not challenge the Ninth Circuit's holding that plaintiffs should be permitted to proceed on claims related to alleged misstatements and omissions about demand and sales. Before this Court, they challenge plaintiffs' case *only* as it relates to false statements about Albuterol Spiros and whether those statements may have caused plaintiffs any loss. At this stage of the case, of course, a connection between injury and loss ordinarily is presumed. *See NOW v. Scheidler*, 510 U.S. 249, 256 (1994); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Petitioners nonetheless contend that the case requires this Court's review at this preliminary stage of the proceedings, to resolve purported conflicts among the circuits on proof of "loss causation" in securities cases. Asking this Court to focus its attention only on alleged misrepresentations and omissions covering Albuterol Spiros, petitioners start by asserting that plaintiffs failed to establish any connection between those misrepresentations and the 47% February 1998 decline in Dura's stock, on announcement that sales were not as good as petitioners had led investors to believe—as if the later 21% decline in the stock, on announcement of the new product's failure before the FDA, never took place. Ignoring the rest of plaintiffs' case, petitioners contend that Ninth Circuit law on loss causation conflicts with that of other circuits, because the Ninth Circuit did not expressly require plaintiffs to plead that the later 21% decline in price on adverse disclosures about Albuterol Spiros's demise before the FDA. Petitioners insist that other circuits would have required plaintiffs to plead more clearly that representations about Albuterol Spiros "touched upon" reasons for the decline.

Although the Ninth Circuit did not focus on it, the conceded fact of the 21% decline, tied to adverse revelations about Albuterol Spiros, means that any conflict among the circuits is of no consequence on the facts of this case. "Whether a securities fraud plaintiff invoking the fraud-on-the-market theory must demonstrate loss causation by pleading and proving a causal connection between the alleged fraud and the investment's subsequent decline in price," might be an interesting question in the abstract, or in a case where it made a difference on the facts presented. But it really is not one presented for decision on the facts of this case, where the security's price clearly did decline upon the relevant disclosure. *See infra* at 4-6. Moreover, on close inspection the purported "conflict" among the circuits

comes to far less than petitioners suggest—amounting more to differences in semantics than in fundamental principles. This Court's review is not needed. *See infra* at 7-14.

Finally, citing the Private Securities Litigation Reform Act of 1995's enactment of a new Exchange Act § 21D(e)(1), petitioners say "the Ninth Circuit's theory of loss causation is not practically viable in light of the Reform Act's explicit limitation on damages, which defines a plaintiffs' loss in terms of a post-transaction decline in stock price." Petition at 7. If petitioners are right that the Ninth Circuit's holding is not "practically viable" when Exchange Act § 21D(e)(1) is properly invoked, it is by no means clear why this Court's review should be needed to apply a provision neither argued nor cited below. Nor is it apparent that applying § 21D(e)(1) could affect the outcome in this case. In any event, it is an issue that petitioners never raised before the Ninth Circuit, and that gives this Court no reason to grant a writ of certiorari. *See infra* at 14-15.

ARGUMENT

I. PETITIONERS' "QUESTION PRESENTED" IS IRRELEVANT ON THE FACTS OF THIS CASE

Petitioners say this Court's review is needed because the circuits are in conflict on the question they wish to present: "Whether a securities fraud plaintiff invoking the fraud-on-the-market theory must demonstrate loss causation by pleading and proving a causal connection between the alleged fraud and the investment's subsequent decline in price." Petition at i. Petitioners say that the Ninth Circuit differs from several other circuits because it imposes no requirement that investors alleging market manipulation and fraud *ever* attribute a decline in their securities' price to defendants' fraud in order to show that the fraud in fact caused their loss.

Assuming that were so, what impact would it have on the facts of this case? Petitioners never say—for it would have none at all. Dura's stock declined 47% in response to defendants' February announcement of weak demand and poor sales, and it declined 21% on defendants' November announcement that the FDA could not approve Albuterol Spiros. *See* Petition at 3 & n.4.

Petitioners make much of the fact their announcement triggering a 47% stock drop in February had nothing to do with their misrepresentations about Albuterol Spiros. Petitioners insist that because misrepresentations about Albuterol Spiros could not have triggered the 47% drop, plaintiffs cannot show that fraudulent statements about Albuterol Spiros caused this loss.

So what? Even if investors must in every case show a drop in a security's price upon disclosure of the truth, petitioners concede—albeit in a footnote—that in fact "Dura's share price declined somewhat following the November 3 announcement, from $12.375 to $9.75." Petition at 3 n.4. That amounts to a one-day drop of more than 21% on announcement that Albuterol Spiros failed before the FDA. "Somewhat" of a decline, indeed.

Thus, even if proof of such a decline is not strictly necessary in every securities case pursued in the Ninth Circuit, and even if the Ninth Circuit law on this point diverges somewhat from other authorities, that really would make no difference at all on the facts of this case. The facts simply do not present, for this Court's resolution, the issue on which petitioners seek review—to resolve a purported "conflict" among the circuits.

Even if the Ninth Circuit's opinion does not demand that the plaintiffs plead the 21% decline, moreover, that dramatic drop in market value still is a part of plaintiffs' case—which they will use to prove their claims. Petitioners point to

Exchange Act § 21D(b)(4), which says that at trial "the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate [the Exchange Act] caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). That is exactly what plaintiffs will do, on remand from the Ninth Circuit.

Petitioners suggest that allowing plaintiffs to do so somehow runs afoul of new pleading requirements enacted by the Private Securities Litigation Reform Act of 1995. They say "Congress sought, in part, to establish uniform and stringent pleading requirements in securities fraud actions arising under Section 10(b) of the Securities Exchange Act of 1934." Petition at 15. But those requirements are contained in Exchange Act § 21D(b)(1) and (2), which require investors both to identify the statements they contend are false along with the reasons why they are false, and also to plead facts raising a strong inference of scienter. 15 U.S.C. § 78u-4(b)(1), (2). Section 21D(b)(3) provides that if these pleading requirements are not met, the case shall be dismissed, imposing a discovery stay during the pendency of any motion to dismiss. 15 U.S.C. § 78u-4(b)(3).

Subsection (4) then provides that *after* surviving motions challenging the pleadings under the foregoing subsections, "the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). This loss-causation requirement, by its terms, imposes no new pleading burden, but merely a "burden of proving"—at trial—that defendants' wrong caused plaintiffs' loss. Again, that is something to be done on remand from the Ninth Circuit. It is not an issue for this Court—certainly not at this stage of the case.

II. PETITIONERS' "CONFLICT" AMONG THE CIRCUITS AMOUNTS TO LITTLE

Petitioners' supposed "conflict" among the circuits amounts to far less than petitioners suggest. For the circuits agree on fundamentals, and differences among them appear to be more a matter of semantics than substantive legal principles.

As this Court has repeatedly stated, investors induced by fraud to purchase a security ordinarily are entitled under § 10(b) to recover their out-of-pocket loss, which is simply "'the difference between the fair value of all that the [plaintiff] received and the fair value of what he would have received had there been no fraudulent conduct.'" *Randall v. Loftsgaarden,* 478 U.S. 647, 661-62 (1986) (quoting *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 155 (1972)). Still, the rule is by no means a rigid one: "'While out of pocket loss is the ordinary standard in a 10b-5 suit, it is within the discretion of the district judge in appropriate circumstances to apply a rescissory measure,'" for example. *Randall v. Loftsgaarden,* 478 U.S. at 662 (quoting *Blackie v. Barrack,* 524 F.2d 891, 909 (9th Cir. 1975)). Relevant concepts of loss, and loss causation, may vary from one case to the next, depending on all the facts presented. *See id.*

Despite petitioners' cries of "conflict," the circuits clearly agree that the recoverable loss in securities-fraud cases typically will be "out of pocket loss," or the difference between the price paid and the value of a security received—as this Court stated in *Affiliated Ute*, 406 U.S. at 155, and *Randall v. Loftsgaarden*, 478 U.S. at 661-57.[1] The circuits

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[1] *See, e.g., Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1030 (9th Cir. 1999); *Farley v. Henson*, 11 F.3d 827, 837 (8th Cir. 1993); *Stone v. Kirk*, 8 F.3d 1079, 1092 (6th Cir. 1993); *Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1336 (8th Cir. 1991), *aff'd on other grounds*, 507 U.S. 170 (1993); *Astor Chauffeured Limosine Co. v. Runnfeldt Inv. Corp.*,

agree as well that *if* investors point to a decline in price as the loss that they suffered, then the investors must eventually show that the fraud they prove at least "touches upon" the reasons for the decline.

While petitioners' argument suggests that the Ninth Circuit holds otherwise, nothing could be further from the truth. It has held more than once that when investors point to a decline in a security's market price as their "loss," they must connect that price decline to the fraud they allege. *See, e.g., Binder v. Gillespie,* 184 F.3d 1059, 1065-66 (9th Cir. 1999); *Provenz v. Miller*, 102 F.3d 1478, 1492 (9th Cir. 1996); *McGonigle v. Combs,* 968 F.2d 810, 820-21 (9th Cir. 1992). Petitioners somehow overlook these decisions even though the opinions below both cite and even quote from them. *See, e.g.*, Appendix at 8a, 39a.

In *McGonigle*, the Ninth Circuit rejected contentions that § 10(b) plaintiffs could recover the decline in a security's value that had nothing to do with the misrepresentations they alleged. The Ninth Circuit adopted as its own the rule stated in *Huddleston v. Herman & MacLean,* 640 F.2d 534, 549 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds,* 459 U.S. 375 (1983):

> As the Fifth Circuit stated in *Huddleston*, 640 F.2d at 549, "the plaintiff must prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss. The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value."

McGonigle, 968 F.2d at 821 (quoting *Huddleston,* 640 F.2d at 549).

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910 F.2d 1540 (7th Cir. 1990); *Levine v. Seilon, Inc.*, 439 F.2d 328, 334 (2d Cir. 1971).

Thus the Ninth Circuit has in fact embraced, and followed, the very rule from *Huddleston* that petitioners say it rejects. Petitioners say: "The majority of Circuits that have explicitly addressed loss causation, including the Second, Third, Seventh, and Eleventh, have adopted an interpretation similar to that set forth in *Huddleston,* while the Eighth and Ninth Circuits have applied a very different rule." Petition at 7. But in *McGonigle* the Ninth Circuit clearly applied *Huddleston. See McGonigle*, 968 F.2d at 821.

The Ninth Circuit applied the rule from *Huddleston* in *Binder* as well, writing: "The loss causation requirement, equivalent to proximate causation in tort, is satisfied if the plaintiff shows that 'the misrepresentation touches upon the reasons for the investment's decline in value.'" *Binder,* 184 F.3d at 1066 (quoting *McGonigle,* 968 F.2d at 821 (quoting *Huddleston,* 640 F.2d at 549)). "That is," the Ninth Circuit explained, "the plaintiff must show that the fraud caused, or at least had something to do with, the decline in the value of the investment after the securities transaction took place." *Binder,* 184 F.3d at 1066. The court affirmed summary judgment against an investor who could not relate any misleading statements to the decline that he claimed as his loss. *See id.*; *see also Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1027 (9th Cir. 1999) (applying *Huddleston*'s "touches upon" formulation); *Provenz*, 102 F.2d at 1492 (same).

Although petitioners insist that Ninth Circuit law conflicts with the Eleventh Circuit's decision in *Robbins v. Koger Properties, Inc.,* 116 F.3d 1441 (11th Cir. 1997), the Ninth Circuit's decision in *Binder* actually cites *Koger Properties* as a decision "noting the important distinction between loss causation and the proof of damages." *Binder,* 184 F.3d at 1066.

In *Koger Properties,* the plaintiff investors contended—at trial—that a given decline in price provided the measure of their loss, but they could show no connection between the

decline and the fraud alleged. Petitioners aptly summarize the decision: "Because the plaintiffs were unable to show that the drop in stock price was related to the alleged misrepresentation, the court of appeals held that the plaintiffs had failed to satisfy the loss causation requirement." Petition at 9 (citing *Koger Properties,* 116 F.3d at 1446, 1448-49). That obviously is quite similar to the Ninth Circuit's holding in *Binder* and *McGonigle*. Any "conflict" among the circuits on this point appears to be rather insignificant. Perhaps that is why the Petition does not so much as cite *Binder* and *McGonigle.*

Nor do petitioners acknowledge that the decision below cites the standard from *Huddleston* that they say the Ninth Circuit rejects: "In this circuit, loss causation is satisfied where 'the plaintiff shows that "the misrepresentation touches upon the reasons for the investment's decline in value."'" Appendix at 8a (quoting *Binder*, 184 F.3d at 1066 (quoting *McGonigle*, 968 F.2d at 821)). The decision below then states another point that petitioners somehow miss: "This 'touches upon' language is admittedly ambiguous." Appendix at 8a. What it ultimately means—and requires—depends upon factual context, and the nature of the fraud alleged. Appendix at 8a-9a. For the connection between fraud and loss may be proved in more than one way. *See Blackie v. Barrack*, 524 F.2d at 909 n.25.

Nor does *Semerenko v. Cendant Corp.,* 223 F.3d 165 (3d Cir. 2000), help petitioners to show a meaningful conflict among the circuits. "In the absence of a correction in the market price," the Third Circuit wrote in dictum, "the cost of the alleged misrepresentation is still incorporated into the value of the security and may be recovered at any time simply by reselling the security at the inflated price." *Id.* at 185. Even as summarized by petitioners, the Third Circuit's holding is entirely consistent with the result in this case. Petitioners write: "Because the plaintiffs had not only alleged

that they purchased shares at an inflated price, but also alleged that the price of their stock declined when the corrective disclosure was made known to the public, the court concluded that the complaint alleged sufficient facts to establish loss causation." Petition at 10. Petitioners cannot dispute the fact that, here too, "Dura's share price declined somewhat following the November 3 announcement, from $12.375 to $9.75." Petition at 3 n.4.

Much the same may be said of *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group Inc.,* 343 F.3d 189 (2d Cir. 2003), in which the Second Circuit held that allegations of a "'pump and dump' scheme"—in which defendants allegedly inflated a security's market price so that they could sell shares before it fell—provided a sufficient connection between the defendants' misstatements and the plaintiffs' loss. *Id.* at 197-98. "Because the second amended complaint may be read as alleging that NETV was a 'pump and dump' scheme," the Second Circuit held, "appellant has adequately alleged loss causation for the purposes of its federal securities fraud claims." *Id.* at 198.

Petitioners identify no discernible conflict between this holding and the law of any other circuit. Rather, they look to *obiter dictum* in *Emergent* discussing the Second Circuit's prior decision in *Suez Equity Investors L.P. v. Toronto-Dominion Bank,* 250 F.3d 87 (2d Cir. 2001). But *obiter dictum* is just that—dead words, not law. Any inconsistency between *Emergent*'s dictum on the one hand, and *Suez Equity* or even the decision below, on the other, is something that the lower courts can deal with. It hardly requires this Court's intervention. As the Seventh Circuit observed when it addressed loss caustion in *Bastian v. Petren Resources Corp.*, 892 F. 2d 680, 685 (7th Cir. 1990), "such conflict as there is appears to be within rather than among circuits." And even

then, "cases that express disagreement" in all likelihood remain reconcilable—reflecting *differing facts* rather than *differing doctrines*. *Id.* at 685-86.

In *EP MedSystems, Inc. v. Echocath, Inc.*, 235 F.3d 865 (3d Cir. 2000), for example, the Third Circuit noted semantic differences between its *Semerenko* decision—on which petitioners now rely—and earlier Third Circuit decisions. The Third Circuit brushed linguistic inconsistencies aside, joining other circuits in their "practical approach" to loss causation—focusing on the facts of each case rather than on the verbal formulae framed to deal with each unique situation. The Third Circuit explained:

> Some of the other courts of appeals have also adopted a practical view of loss causation. For example, the Eighth Circuit has stated that "plaintiffs are not required to meet a strict test of direct causation under Rule 10b-5; they need only show some causal nexus between [the defendant's] improper conduct and plaintiff's losses." *In re Control Data Corp. Sec. Litig.*, 933 F.2d 616, 619 (8th Cir. 1991) (quotation omitted). The Second Circuit similarly held that loss causation "embodies notions of the common law tort concept of proximate causation." *AUSA Life Ins. Co. v. Ernst and Young*, 206 F.3d 202, 216 (2d Cir. 2000) (quotation omitted). *In Ambassador Hotel Co., Ltd. v. Wei-Chuan Investment*, 189 F.3d 1017, 1027 (9th Cir. 1999), the Ninth Circuit stated that "the loss causation requirement limits the ability of plaintiffs to recover for losses sustained on the basis of factors unrelated to any misrepresentation or fraud." As the Eleventh Circuit stated in *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997), "the loss causation requirement must be applied on a case-by-case basis."

EP MedSystems, 235 F.3d at 884. These are, of course, the very circuits that petitioners insist are in purported "conflict."

What is more, the Third Circuit emphasized, "[t]he causation issue becomes most critical at the proof stage." *Id.* "Whether the plaintiff has proven causation is usually reserved for the trier of fact." *Id.* at 884-85 (citing *Huddleston*, 640 F.2d at 549-50 as reversing for failure to submit causation to the jury). "MedSystems' complaint," the Third Circuit emphasized, "was dismissed at the pleading stage." *Id.* at 885. "Although, as noted above," the Third Circuit continued, "the allegation that it 'sustained substantial financial losses as a direct result of the aforementioned misrepresentations and omissions on the part of EchoCath' could have more specifically connected the misrepresentation to the alleged loss, *i.e.*, investment in a company with little prospects, when we draw all reasonable inferences in plaintiff's favor, we conclude that MedSystems has adequately alleged loss causation." *Id.* For at the pleading stage, the connection between alleged wrongdoing and loss may be assumed. *See NOW v. Scheidler*, 510 U.S. at 256; *Lujan*, 504 U.S. at 561.

This case presents no fundamental conflict at all. When all is said and done, the decisions that petitioners cite conflict not in the fundamental principles at stake, but—at most—merely in semantic dicta. Dicta in the decision below suggests that "other circuits are less favorable to plaintiffs" because they demand "demonstration of a corrective disclosure followed by a stock price drop," when the Ninth Circuit might not always require this. Appendix at 9a n.4. Dicta in *Koger Properties* suggests that the Ninth Circuit may be more liberal than the Eleventh Circuit when plaintiffs seek to recover as their loss a decline in their security's price that they cannot connect to any of defendants' alleged misstatements. *Koger Properties*, 116 F.3d at 1448.

But it takes more than trifles like that, making no difference at all on the facts presented, to warrant issuing a writ of certiorari.

III. THE EXCHANGE ACT'S STATUTORY "LOOK-BACK" PROVISION NEITHER WAS RAISED BELOW, NOR HAS ANY APPARENT IMPACT ON THE FACTS OF THIS CASE

Petitioners make much of Exchange Act § 21D(e)(1), which was enacted by the Private Securities Litigation Reform Act of 1995, and provides that

> in any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.

15 U.S.C. § 78u-4(e)(1).

Although they never even so much as cited this provision before the Ninth Circuit, petitioners say it now requires this Court to review the decision below. In fact, this Court seldom should be called upon to resolve matters, well within the competence of a lower court, that litigants chose not to raise below. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Had petitioners cited it, the Ninth Circuit might well have observed that the provision has little relevance on the facts of this case—facts that, once again, petitioners prefer to ignore. For the provision in question provides merely that damages "shall not exceed the difference between the purchase . . . price paid . . . by the plaintiff for the subject security and the mean trading price of that security" following full disclosure of the truth. 15 U.S.C. § 78u-4(e)(1). Here, the four named plaintiffs who purchased common stock all paid from $36.35

to $45.35 apiece for their shares. ER72:¶¶ 41-46. The stock collapsed dramatically in February on disclosure of poor sales, and again in November on disclosure of Albuterol Spiros's failure with the SEC—falling "from $12.375 on November 3, 2003 to $9.75 on November 4, 2003." Petition at 18 n.12. Thereafter it fluctuated—for reasons that petitioners never specify—purportedly rising as high as $16 at some point, and closing at $14 once ninety days had passed. Petition at 18 n.12.

Although petitioners never specify the purportedly relevant "mean trading price" for this period, it apparently was substantially less than *half* the price that each of the named plaintiffs paid for their shares of common stock. That the "look-back" provision could have *any* impact on the damages in this case is doubtful, at best. That it warrants a writ of certiorari is insupportable.

CONCLUSION

This case presents no issues warranting this Court's review. Assuming any conflict among the circuits really exists on proof of loss causation in § 10(b) cases, it makes no difference at all on the facts of this case. Though petitioners endeavor to generate the appearance of a conflict in the law of loss causation, it evaporates on careful inspection of the precedents. Finally, petitioners neither raised their "look-back" argument below, nor explain now how it could have any conceivable impact on the facts of this case. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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